No. 96-1925

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CATERPILLAR, INC.,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its affiliated LOCAL UNION 786,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Of Counsel:
MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

JONATHAN P. HIATT
JAMES B. COPPESS *
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5337
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST

The collective bargaining agreements negotiated by unions affiliated with the AFL-CIO typically contain multi-stage grievance procedures similar to the procedure at issue in this case. Many of the agreements—particularly those covering employees at large industrial plants—also contain no-docking provisions—that is, provisions allowing covered employees selected by their fellow-employees to serve as part-time or full-time representatives at various levels of the grievance procedure without loss of pay. The complaint filed by Caterpillar, Inc. in this case challenges the legality of these no-docking provisions and thereby threatens the contractual grievance procedures negotiated by AFL-CIO affiliates.

SUMMARY OF ARGUMENT

No-docking provisions that allow employees to continue to receive their normal pay while serving as in-plant grievance-representatives are extremely common in single-employer industrial collective bargaining agreements. The reason for this is that the parties to such agreements have determined that a hierarchical multi-step system of representation, staffed on the workers' side at each step by representatives drawn from the work-group, is the best system for giving voice to the workers' interests and, hence, for resolving disputes. The representatives filling the top positions in this hierarchy necessarily spend all, or almost all, of their worktime on grievance-handling and in-plant problem-solving. Given the historical evolution of this system and the natural progression within each plant's grievance procedure from part-time grievance representatives at the lower steps to full-time representatives at the final steps, it has become common practice for agreements to provide that employers will continue to pay employees their normal pay while they serve as either part-time or full-time grievance-handlers. An interpretation of § 302 of the Labor Management Relations Act forbidding this

practice would completely upset the system of workplace representation that has become common in large unionized facilities.

ARGUMENT

The question before the Court in this case is "whether an employer granting paid leaves of absence to employees who then become the union's full-time grievance chairmen violates § 302 of the Labor Management Relations Act, 29 U.S.C. § 186." Pet. App. 3a. This brief does not revisit the legal arguments supporting the conclusion that the answer to this question is "no," as those arguments are addressed convincingly by the *en banc* majority below, and by the Union in this Court. Rather, we seek to inform the Court's consideration of the question presented by surveying the nature, history and purpose of collective bargaining agreement provisions establishing multi-step grievance procedures and permitting employees chosen for the role by fellow employees to serve as grievance representatives without loss of pay. As we demonstrate, this practice is, and was at the time § 302 was enacted, an exceedingly common one, and has long been understood both by government agencies and by industrial relations experts as a useful component of an effective in-plant dispute resolution system.

Indeed, the standard system for employee representation at firms covered by single-employer collective bargaining agreements is a multi-step grievance procedure, with employee union representatives at each step selected from among the group they serve. The contract between Caterpillar and the UAW here at issue is a good example of the "typical [labor] agreement . . . which provides for successive steps through which a worker and his representative may take a grievance. . . ." Kuhn, *Bargaining in Grievance Settlement* 6 (1961). Like the Caterpillar/UAW contract, such agreements "commonly . . . provide for four steps" with "[t]he participants at each succeeding step [being] higher-ranking officers of manage-

ment and union." *Id.* *See* Jt. App. 5-6, 43-47. The grievance chairman and alternative committeeman at Caterpillar, which are the positions in dispute in this case, handle grievances at the third and fourth steps of the procedure. *Id.* If a grievance is not resolved by the fourth step, the UAW International Union may take the dispute to arbitration. Third Cir. App. 54.

The hierarchy of the multi-step grievance procedure tends to bring forward a few key grievance handlers in each plant. The employee union representatives at the top of the hierarchy play a key role both in processing formal grievances plantwide or for several departments, and in resolving disputes informally. Performing these functions can be quite time-consuming and, in larger workplaces, the employees occupying these top slots generally spend all or almost all of their work-time handling labor problems.

Like the Caterpillar/UAW agreement, most collective bargaining agreements establishing a multi-step, in-plant grievance procedure provide that the employees selected by their fellow employees to present grievances to management may perform their representative functions during work-time with no loss of pay. More than half of the unionized private sector workforce is covered by collective bargaining agreements expressly providing that employees may carry out their functions as grievance representatives during employer-paid work-time. U.S. Dept. of Labor, *Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business,* Bulletin 1425-19 (October 1980) ("*Employer Pay and Leave for Union Business*"), Table 1, p. 32. Such contract provisions (termed "no-docking provisions" in this brief) are especially prevalent in manufacturing, covering almost two-thirds of union-represented workers in that sector. *Id.*[2]

[2] A major reason for this concentration in manufacturing is that manufacturing agreements, which tend to cover larger facilities and larger employers, are not likely to be multi-employer agreements. While grievances under single-employer collective bargaining agreements are likely to be handled by representatives chosen by the employees from among their own ranks, grievances under multi-employer agreements are more likely to be handled by union staff members, such as business agents. Dept. of Labor, *Employer Pay and Leave for Union Business* 4.

By contrast, only one out of ten manufacturing agreements expressly state that employees will *not* be paid for time spent on grievance-handling, with the remaining one-quarter of such agreements silent on the matter. *Id.* And even where the contract is silent, the parties are as likely as not to follow a practice of allowing employees to take paid-time for grievance handling. *Id.* at 6.[2]

An interpretation of LMRA § 302 forbidding the common practice of allowing employee union representatives in the grievance procedure to continue being paid by the employer would therefore have a profoundly unsettling effect on many established grievance procedures, and on the overall collective bargaining relationship in workplaces in which such procedures have been established.

1. *History and Nature of In-Plant, Multi-Tier Grievance Procedures.*

No-docking provisions such as the one at issue here arose in conjunction with the development of the multi-step grievance procedures common to industrial collective bargaining agreements. To understand the reasons such compensation provisions became standard in many industries, it is most useful to begin by considering the development and characteristics of the kind of dispute resolution

[2] The U.S. Department of Labor has consistently taken the position that payments to employee union representatives made pursuant to collectively bargained no-docking arrangements fall within the LMRA § 302(c) exceptions allowing such payments and hence do not have to be reported on the financial reports required by the Labor Management Reporting and Disclosure Act. *See P.R. Mallory & Co.*, 36 BNA Labor Arb. Rep. 351, 367-368 (Arb. Stark, 1960) (describing the LMRDA reporting requirements in this regard and the Department of Labor's position).

system in which no-docking provisions are typically embedded. That consideration indicates that the multi-step grievance process depends for its effectiveness on employee representatives who come from inside the workforce and remain closely associated with their fellow-employees on a day-to-day basis, rather than on professional union staff serving many workplaces but organically attached to none. Thus, to put the matter in the terms of LMRA §302(c)(1), there can be little quesion that the employee representatives in this sort of grievance procedure were chosen to fill their positions "by reason of [their] service as an employee of such employer." 29 U.S.C. § 186(c).

Multi-tier grievance systems ending in arbitration were first introduced in collective bargaining agreements covering the anthracite and garment industries just before World War I. Chamberlain & Kuhn, *Collective Bargaining* 147-149 (2d ed. 1965). This method of grievance resolution was later taken up by the mass-production unions, such as the UAW, that formed the Congress of Industrial Organizations in the 1930's. *Id.* These grievance procedures became firmly ensconced as a standard feature of American labor relations during World War II, when the National War Labor Board embraced such procedures as representing "the best practices of employers and unions, developed through years of collective bargaining and of trial and error. . . ." *The Termination Report of the National War Labor Board*, vol. 1, p. 65 (1947) ("*NWLB Termination Report*"). *See* Lichtenstein, *Labor's War at Home* 178-179 (1983).

Under this method of grievance handling, the employee union representatives who present grievances at the pre-arbitration steps of the procedure overwhelmingly tend to be drawn from the ranks of the represented group. In large facilities in particular, the selection of employee representatives from the ranks of the represented group is essential to the effective operation of the grievance procedure. For, as the National War Labor Board's concluded, the prompt and effective resolution of grievances "[is] best assured when immediate, initial attention [comes] from those in the plant who ha[ve] intimate knowledge of the complaint . . . ." Kuhn, *Bargaining in Grievance Settlement* 5.

The primary reason for reliance on employee grievance-handlers is that, "[b]y contrast [with contract negotiation], the province of grievance negotiation is each local workplace and the process involves primarily the *daily* adjustment of *individual* rights." Kennedy, "Grievance Negotiation," in Kornhauser, *et al.*, eds., *Industrial Conflict* 280 (1954) (emphasis supplied). To take a non-random sample, the type of issues that are "grist in the mills" of such grievance procedures, *Steelworkers v. Warrier & Gulf*, 363 U.S. 574, 584 (1960), can range from whether a particular employee is "physically able to do the work," *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 564-565 (1960), to whether a company's "contracting out work to other concerns, that could and previously has been performed by Company employees . . . becomes unreasonable, unjust and discriminatory in lieu [*sic*] of the fact that at present there are a number of employees that have been laid off for about 1 and ½ years or more for allegedly lack of work," *Warrior & Gulf*, 363 U.S. at 575-576, to whether discharge was too severe a penalty for "[a] group of employees [who] left their jobs in protest against the discharge of one employee," *Steelworkers v. Enterprise Wheel Corp.*, 363 U.S. 593, 595 (1960).

In order to effectively handle such localized issues, grievance representatives must be "intimately acquainted with the people and the problems of their units." Crane & Hoffman, *Successful Handling of Labor Grievances*, 104 (1956). *See* Chamberlain & Kuhn, *Collective Bargaining*, 151 (describing how this knowledge comes into play during grievance negotiation). Plant-based representatives can develop such expertise and familiarity, since they are 'continually able to sound out their constituents as to the relative importance of different demands," thereby allow-

ing "the rank and file [to] exercise considerable influence over the processing of grievances." Sayles & Strauss, *The Local Union* 152-153 (1967).

The availability of on-site representatives with a background in the workplace "give[s] the workers an opportunity to express themselves and also require[s] the directors of their work lives to hear and to consider their problems seriously." Kuhn, *Bargaining in Grievance Settlement* 23. By the same token, the represented workers' confidence in their representative's intimate understanding of their condition is important to their willingness to accept resolutions of their grievances negotiated by that representative. *See* Chamberlain & Kuhn, *Collective Bargaining* 157 ("peaceful grievance settlement can be assured . . . only as long as workers can expect and are willing to fulfill their job demands through the regular union organization"). If they feel their designated representatives are not responsive to their needs, "the workers still have a final recourse: following their 'informal' leaders, they can resort to wildcat strikes, work restriction, and other forms of self-help." Sayles & Strauss, *The Local Union* 150. And, in turn, the grievance-handler's knowledge of her constituency gives her the confidence necessary to resolve disputes by compromise with management. Duane, *The Grievance Process in Labor Management Cooperation* 97 (1993) ("when representatives have little or mixed information about their constituents' expectations or desires, their negotiating approach is typically more aggressive than if they were negotiating on their own behalf").

Once established, then, the workplace-based grievance representatives serve to enhance the voice of their employee constituents more effectively than representatives who arrive intermittently from outside the workplace to deal with disputes.[8] Indeed, such on-site representatives

[8] The grievance chairman at Caterpillar's York plant is stationed at the Local Union office, which is less than a mile from that facility. Jt. App. 60; Third Cir. App. 610. The Union would have preferred that the York grievance chairman work out of an in-plant office, as is the practice at Caterpillar's Peoria plant, but the Company insisted that he work out of the Local Union hall. Jt. App. 16, 60. Even so, the York grievance chairman spends at least a day and half each week in the plant. Third Cir. App. 612.

tend to create "a power center at the place of work—within, though not necessarily an integral part of, the local union." Chamberlain & Kuhn, *Collective Bargaining* 160.

Positions such as grievance chairman, committeeman and steward are, as here, most often created by the collective bargaining agreement, rather than by the union constitution or bylaws. *See* Third Cir. App. 210-211. The workplace channels for employee expression created by the contractual grievance procedure are thus distinct from the governance procedures of the union as a membership organization. In these circumstances, it can be said that "unions possess two governments rather than one," each with "a distinct and an appropriate structure":

> One government, the executive board, is concerned with relations within the union and is formed in accordance with the local constitution and bylaws. The other government, the shop stewards and shop committee, is concerned with relations with the employer and is formed in accordance with the collective bargaining agreement. [Nash, *The Union Steward: Duties, Rights, and Status* 12 (2d ed. 1983).]

And it has been suggested that, "[i]n the daily informality of the work group," which is the province of the second form of government, "workers probably have a better chance to participate in decisions, to be heard, and to make their influence felt than in even the local union." Chamberlain & Kuhn, *Collective Bargaining* 161.

It is, therefore, not an accident that every country with an advanced system of collective bargaining has found some form of "workplace organization" to be essential to

industrial stability. *See* Clegg, *Trade Unionism Under Collective Bargaining* 55-68 (1976). Whereas in some countries, such as Germany, the "workplace organization" takes the form of statutory works councils, in the United States it has taken the form of in-plant grievance procedures. *Id.* at 58-63. The workplace-based nature of the typical industrial grievance procedure in the United States is essential to the attempt to "regulate all aspects of the complicated relationship [among workers and management in a large industrial facility], from the most crucial to the most minute over an extended period of time." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. at 580. As a result, "the grievance machinery . . . is at the very heart of the system of industrial self-government." *Id.* at 581.

2. *Development and Function of No-Docking Provisions.*

Precisely because "the workers themselves elect stewards or committeemen from among the ranks of their own department or work group," rather than from professional union staff, Chamberlain & Kuhn, *Collective Bargaining* 156, the question arose whether these workplace-based representatives should continue to be paid by the employer while carrying out their grievance functions, thereby carrying on in large part as members of the represented workplace. No-docking provisions in collective bargaining agreements developed as part of the workplace-based, hierarchical grievance systems themselves, and reflect in large part the preference in such systems that pre-arbitration grievance-handlers remain as much as possible rank-and-file employees rather than professionals on the union staff.

"To ensure the availability of grievance settlement, unions must provide an adequate number of representatives at the place of work." Chamberlain & Kuhn, *Collective Bargaining* 156. Moreover, "[a]greements almost

always guarantee [such] representatives the right to interrupt their jobs . . . and move about appropriate areas of the plant to talk with workers, other union officers, and foremen." *Id.* In manufacturing plants, it is not at all uncommon for even stewards, who handle grievances at the first step, to spend more than half of their work-time on grievance-related activities. Nash, *The Union Steward* 14. But few rank-and-file employees have the luxury of inherited trust funds to support them and their families; therefore, some provision must be made in collective bargaining agreements for assuring that the employees selected to perform that task are able to do so on a paid rather than volunteer basis. In short, because "[w]orkers designated or elected to serve as shop stewards or committeemen . . . are frequently called away from their regular jobs to carry out such responsibilities," it is no coincidence that collective bargaining agreements providing for such in-plant representation also typically contain "provisions . . . designed to protect these union representatives, when so engaged, from loss of wage income." U.S. Dept. of Labor, *Collective Bargaining Clauses: Company Pay for Time Spent on Union Business*, Bulletin No. 1266, p. iii (October 1959).

The precise historical link between the development of modern industrial grievance procedures and the provision for paid leave allowing employees to staff such procedures is indicated by the course of collective bargaining in the automobile industry. A key feature of the 1940 General Motors-UAW agreement was the introduction of a modern grievance-arbitration procedure. Lichtenstein, "Great Expectations: The Promise of Industrial Jurisprudence and its Demise, 1930-1960," in Lichtenstein & Harris, eds., *Industrial Democracy in America* 29 (1993). One year later, the 1941 UAW-GM agreement included no-docking provisions that allowed Committeemen and the Chairman of the Shop Committee to use paid work-time for grievance handling. Third Cir. App. 335. That same year, the Ford-UAW agreement also contained a no-

docking clause, which expressly provided that "[a]ll building chairmen shall devote their full time to their duties as such" and "shall receive the same wages which were received by them on their respective jobs at the time they become building chairmen. . . ." *Id.* 295. Two years later, in 1943, similar provisions became part of the Chrysler-UAW agreement. *Id.* 376.

During World War II, the National War Labor Board frequently considered whether to impose such part or full-time no-docking provisions in order to improve the operation of grievance procedures included in collective bargaining agreements. 1 *NWLB Termination Report* 124-129. The War Labor Board had the authority to require the inclusion of such clauses in the course of resolving particular labor disputes that threatened to disrupt the war effort.

The War Labor Board first confronted the grievance-handler compensation issue in *International Harvester Co.*, 1 War Labor Rep. Rep. 112 (1942), where it ordered the inclusion of a clause providing that "Union representatives who are employees shall not lose pay during the time spent in handling grievances within the plant." *Id.* at 114. The Board's rationale was that "the practice of quickly investigating and promptly disposing of grievances . . . should be encouraged" and that the adoption of a no-docking clause "will eventually mean greater efficiency and higher morale [and] . . . a healthier company-union relationship." *Id.* at 122.[4]

[4] The *International Harvester* opinion was written by Wayne Morse, *id.* at 114, who, as a member of the Senate Labor Committee in 1947, participated actively in the debate over the Taft-Hartley Act. Senator Morse made a lengthy speech in opposition to the amendment that was enacted as § 302. NLRB, *Legislative History of the Labor Management Relations Act of 1947* (1948), vol. II, pp. 1317-20. His grounds of opposition were that the amendment would interfere with the established practice of negotiating union-administered benefit funds without adequate investigation into the extent and nature of those arrangements or the state law governing them. *Id.* at 1318. Senator Morse authored or joined a number of War Labor Board decisions concerning the issue of no-docking provisions, including the three decisions discussed in text here. If he believed that § 302 would outlaw such provisions, he certainly would have said so. Yet, neither he nor any other Senator even suggested that these provisions, which had received such widespread attention in the War Labor Board decisions, would be at all affected by § 302.

The next case in which the Board confronted this issue concerned the employer in this case, Caterpillar. *Caterpillar Tractor Co.*, 2 War Labor Rep. 75 (1942). Once again, the Board ruled that "the contract should provide for compensation for union representatives who lose time in handling grievances." *Id.* at 95.[5] Explaining its decision, the Board stated:

> The adjustment of grievances . . . is business in which the union and the company are equally interested. The practice of paying union representatives while they are handling grievances is very common in industry. [*Id.*]

The Board's general approach to the no-docking issue was summed up in *McQuay-Norris Co.*, 9 War Labor Rep. (1943),[6] as follows:

> [T]he question of company payment to union representatives for handling grievances . . . can only be

[5] The panel recommendation adopted by the Board in *Caterpillar* was authored by Harry Shulman, *id.* at 96, a labor law scholar with "vast and extraordinarily successful experience . . . as a labor arbitrator, especially under the collective-bargaining contract between the Ford Motor Co. and the UAW-CIO." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 463 (1957) (Frankfurter, J., dissenting). *See Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. at 578 (citing Dean Shulman's views on resolution of labor grievances); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 n.16 (1974) (quoting Dean Shulman).

[6] The opinion in *McQuay-Norris* was written by George Taylor, a prominent labor arbitrator who served as a neutral umpire under the GM-UAW agreement. *See* Lichtenstein, *Industrial Democracy in America* 135.

> properly considered as a phase of the problem of making collective bargaining work most effectively in the prompt and equitable handling of grievances over the interpretation and application of the terms of labor agreements. [*Id.* at 542.]

While "the basic structure of present-day grievance procedures had evolved by the end of World War II," particular features of the structure continued to evolve after the war. Thomson, *The Grievance Procedure in the Private Sector* 7-8 (1974). Thus by 1947, when Congress enacted § 302, no-docking agreements were a common feature of industrial relations. U.S. Department of Labor, "Grievance Procedure Under Collective Bargaining," 63 Monthly Lab. Rev. 175, 184 (1946). By 1959, when Congress amended § 302, just over half of all manufacturing collective bargaining agreements contained no-docking provisions. Dept. of Labor, *Company Pay for Time Spent on Union Business* Table 1, p. 3. And by 1980, the number of manufacturing agreements containing such provisions had grown to nearly two-thirds. Dept. of Labor, *Employer Pay and Leave for Union Business* Table 1, p. 32. *See* pp. 3-4, *supra*.[7]

[7] The agricultural implement manufacturing industry tended to lag behind in the development of well-functioning grievance procedures. McKersie, "Structural Factors and Negotiations in the International Harvester Company," in Weber, *The Structure of Collective Bargaining* 279-303 (1961). The problems with grievance handling experienced in this industry did not begin to subside until the end of the 1950s, due in part to intra-union rivalry that persisted until that time. *Id.* The relatively delayed development of the grievance handling machinery in this industry was reflected in the industry pattern of no-docking and compensation continuity provisions. While the War Labor Board imposed as-needed no-docking provisions on agriculture implement manufacturers in the early 1940s, it was not until the early 1970s that the collective bargaining agreements in this industry began to provide for full-time paid leave for grievance chairmen. Jt. App. 57-58; Third Cir. App.), 270 (1971 Deere agreement). By contrast, such full-time no-docking provisions appeared in automobile manufacturing agreements as early as 1941. Third Cir. App. 295.

In sum, as the very term "no docking" suggests, the practice of employer payment of compensation to employee grievance representatives was perceived from the outset as a way of assuring that employees selected to perform this task are not penalized by the employer for doing so by losing pay at the usual rate. As we develop immediately below, the assignment of some employees to grievance-handling on a full-time basis, and the application of no-docking provisions to these full-time grievance-handlers, arises organically out of the nature of the grievance procedure and does not present any principled difference from the part-time assignment of employees to this function.

3. *Full-Time Grievance Handlers.*

The need for full-time grievance-handlers arises from the hierarchical structure of the typical industrial grievance procedure itself. "The degree of involvement in grievance activity, and consequently the amount of time needed, is likely to vary with the union official's position." Dept. of Labor, *Employer Pay and Leave for Union Business* 8 The higher level representatives "handle grievances constantly," Chamberlain & Kuhn, *Collective Bargaining* 155, "giv[ing] all or almost all their time to union business." Clegg, *Trade Unionism Under Collective Bargaining* 61.

From its inception and by its basic design, the modern grievance procedure is hierarchical. Jt. App. 59 (describing the typical UAW grievance procedure). Thus, the War Labor Board "stressed the importance . . . of making sure that [there are] different people at the different steps." 1 *NWLB Termination Report* 113. The theory behind this recommendation is that "[a]t each of several succeeding steps, the grievance may be appealed to higher-ranking officers who are less likely to be involved in the case and better able to judge it on its merits." Chamberlain & Kuhn, *Collective Bargaining* 151. Compared to part-time grievance handlers, such as stewards, the rep-

resentatives at the higher levels are "assumed to be more conversant with the agreement, more familiar with union-management policies and practice, and able to judge the single issues in a context of total plant relationships." Kennedy, "Grievance Negotiation," in Kornhauser, *et al.*, eds., *Industrial Conflict* 289 (1954).

"[U]nions tend to focus authority for grievance resolution on a few individuals above union stewards." Davy, Steward & Anderson, "Formalization of Grievance Procedures: A Multi-Firm and Industry Study," 13 J. Lab. Res. 307, 309 (1992). *See* Sayles & Strauss, *The Local Union* 21-22. Thus, in the typical industrial labor agreement, "[t]he chairman of the grievance committee ha[s] a strong role in the formal grievance procedure." Peach & Livernash, *Grievance Initiation and Resolution* 86 (1974). Unlike the lower level stewards and intermediate level committeemen, who "confine[] [their] investigation to the department, district, or division [they] represent[]," the "chairman of the grievance committee is granted, in many contracts, permission to handle grievances throughout the entire plant." Crane & Hoffman, *Successful Handling of Labor Grievances* 99-100.

"The Chairman's job is to make sure the contract works," Jt. App. 62, and more is entailed in this problem-solving role than can be discerned from the description of his formal position in the collective bargaining agreement. *See, e.g., id.* at 87-88. Employee representatives at the higher stages of the procedure not only "deal with the most difficult grievances from all parts of the plant," they "carr[y] on the day-to-day negotiations with plant management with regard to general shop issues. . . ." Chinoy, *Automobile Workers and the American Dream* 103 (1955). As one leading authority has put it, "The grievance-committee step not only helps put out fires, but is like a professional fire department that also seeks to prevent fires before they start." Kuhn, *Bargaining in Grievance Settlement* 7. The problems addressed "are so

complex, varied, and unpredictable in their frequency and intensity that they cannot be forced into predetermined procedural channels." Thomson, *The Grievance Procedure in the Private Sector* 19. As a result, "the so-called grievance procedure . . . verges on a continuous process of problem solving." Sayles & Strauss, *The Local Union* 13.

The presence of elected employee representatives, who spend all or virtually all, of their work-time handling employee complaints and serving on joint employer-employee committees, is therefore a common feature of mature plant-based representational systems. Clegg, *Trade Unionism Under Collective Bargaining* 58-61 (comparing Germany, Sweden & the United States in this regard). And the plant-based grievance representatives' "independence, influence with the workers, and administrative duties (formal and informal) give them a position of importance in the shop," so that "they become secondary or even equal centres of power in the shop, sometimes rivaling the foreman and his line superiors." Chamberlain & Kuhn, *Collective Bargaining* 157. *See* Sayles & Strauss, *The Local Union* 21 ("chief stewards . . . feel freer from possible retribution").

The responsibilities of the grievance committee chairman are such, then, that handling grievances or similar employee matters is virtually a full-time job. Jt. App. 59-60. Prior to the 1973 collective bargaining agreement between the UAW and Caterpillar, the grievance committee chairman, as one of the grievance committeemen, was allowed to handle grievances during work-time on an as-needed basis without any loss in pay. Third Circuit App. 276-278. In 1973, the parties agreed that there would be a full-time grievance chairman, who would spend all of his work-time handling grievances or serving on various joint employer-employee committees.

Jt. App. 58-59.[8] In 1979, the parties agreed to treat the alternate committeeman in the same way. Third App. 167.

Caterpillar and the UAW could, presumably, have agreed instead to continue the earlier practice of part-time higher-level grievance representatives rather than two full-time ones, but they evidently preferred the continuity provided by fewer individuals handling grievances at the upper levels of the dispute resolution system. And, the evidence here shows that the employer found it more efficient for the plant's operations to have full-time employee representatives rather than part-time individuals leaving their job posts at unpredictable times to carry out their representational duties. Jt. App. 59-60. The choice is inherently one of practicality rather than principle and does not change the basic legal relationships among the employer, the union, the employee representative, and the employees.

4. *Impact of Grievance-Handling Cost Distribution on Employees.*

A final factor in the development of workplace-based grievance representation for employees is that the cost of such employee representation is significant. Caterpillar asserts that the annual cost of providing wages and benefits to the grievance chairmen and the alternate committeemen in its various plants approaches $2 million. Third Cir. App. 167. *See* Duane, *The Grievance Process in Labor-Management Cooperation* 74 (no-docking provisions cost General Motors $13 million in 1969). Because the expense is not trivial, and because the expense is identical in form to that incurred on behalf of other employees

[8] The chairman would continue to collect his normal pay from Caterpillar, except that the Local would cover his pay for periods when he was engaged in Union activities that are unrelated to grievance-handling or similar problem-solving at the plant. Third Civ. App. 50, 613-614.

—wages, benefit contributions, holiday pay, and so on—the amount paid by the employer to employees serving in the workplace-based employee representation system is perceived, in determining the overall cost of the collective bargaining agreement, as simply part of the cost of the total wage-benefit package. *See* Davey, *Contemporary Collective Bargaining* 337 (3d ed. 1972) ("To the employer, labor cost is labor cost."); Loughran, *Negotiating a Labor Contract: A Management Handbook* 311 (1992) ("To the extent possible, all contractual changes that have an ascertainable cost impact should be included in the settlement package cost estimates.").

Because the employer is simply continuing to pay employees who remain active in the plant on plant-related business regular collectively-bargained wages and benefits and doing so as part of the regular payroll, it is extremely unlikely that either the employer or the employees perceives the compensation as flowing to the elected representatives by virtue of their representational role, rather than by virtue of their status as employees as of the time they are chosen to serve. This employer-provided continued compensation is not cost-free to the employees, there are inevitably trade-offs elsewhere in the wage-benefit package to cover the employers' agreement to pick up this expense. The affected workers, nevertheless, repeatedly demonstrate their willingness to accept such trade-offs by ratifying agreements that include no-docking provisions. *See* Dept. of Labor, *Employer Pay and Leave for Union Business*, Text table 7, p. 6 (no-docking provisions appear in 93% of UAW agreements covering 97% of UAW-represented employees). And this acceptance is understandable since the alternative means of paying for in-plant employee representation—payment from the union treasury—would not be cost-free to the employees either, and could create economic incentives inconsistent with the most effective workplace representation.

If unionized workers are deprived of the services of plant-based representatives currently paid on a no-docking basis by the employer, the most likely effect would be to diminish the role of elected employee representatives in favor of an enhanced role for professional union staff generally and International Union Representatives particularly. The employees have already "taxed" themselves for the in-plant representatives by ratifying a collective bargaining agreement incorporating the wage-benefit trade-off for the employer's agreement to allow paid employees to play this role. That being so, they are unlikely to vote to tax themselves once again in the form of higher dues payments to finance the costs of in-plant representatives. Instead, the most likely means of filling the void is to assign the International Representatives, i.e., professional union staff from outside the plant, to handle all steps of the grievance procedures. Such International Representatives already assist grievance chairmen at the higher steps of the contractual procedure. The result of assigning the International Representatives to all steps would be that the multi-stage procedure will be effectively compressed into a single step and the salutary effects of workplace-based representation described above will be lost.

While the International Representatives serve a valuable function in managing the more legalistic procedure, *see* Lichtenstein, *Industrial Democracy in America* 137, they "do not have regular contact with the rank and file," Sayless & Strauss, *The Local Union* 145, and need to be "assisted by a local officer or grievance committee member," if they are to successfully resolve local problems. Catlett & Brown, "Union Leaders' Perceptions of the Grievance Process," 15 Lab. Studies J. 54, 60 (1990). It is, therefore, all but certain that the International Representatives will not be sufficiently part of the "network of relationships" that constitutes the actual grievance procedure in the plant to adequately fill the role of the grievance chairman. N. Chamberlain, "Determinants of Collective Bargaining Structures," in Weber, *The Structure of Collective Bargaining* 17.

The 1947 Congress that enacted LMRA § 302 also enacted LMRA § 203(d), which provides that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. § 173(d). *See Steelworkers v. American Mfg. Co.*, 363 U.S. at 566. An interpretation of § 302 that would bar employers from continuing to pay full-time workplace-based grievance-handlers would profoundly change the "method for settlement of grievance disputes" that has evolved in American industry over the course of this century. There is no indication that the 1947 Congress intended to hinder the ability of employers and labor unions to order the system of workplace representation in this regard as they see fit, and the statute passed by that Congress should not be given an interpretation that has such an effect.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

Of Counsel:
MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

JONATHAN P. HIATT
JAMES B. COPPESS *
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5337
* Counsel of Record